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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS, *et al.*,

Petitioners

v.

MICHAEL BOWERS, *et. al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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Issues Presented

1. Did state Attorney General's opinion requiring naturopaths, whose profession had been recognized by statute in the state since 1950, to be licensed by the general Board of Medical Examiners deprive practicing naturopaths of property without due process of law or at least present a substantial federal question to that effect?

2. Did state Attorney General's opinion prohibiting the practice of naturopathy without a license from the Board of Medical Examiners, violated their first Amendment right to information and Ninth Amendment privacy right to preferred treatment of plaintiffs, residents of Georgia, or, at least, present a substantial federal question to that effect?

3. Did Georgia naturopaths' claim that a Georgia statute prohibiting the practice of naturopathy was vague as applied to them raise a substantial federal question where the statute made practice of medicine without a license a felony unless the practitioner's field was otherwise authorized, and the practice of naturopathy was specifically recognized in another Georgia statute?

4. Was substantial and immediate threat of enforcement of a disputed statute sufficient to warrant federal jurisdiction over a challenge to the statute's constitutionality?

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LIST OF PARTIES

Parties

1.

The GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS AND REGISTRARS, INC., is a non-profit, Georgia corporation. It was established in 1979 to provide a system of internal regulation of the profession, for the protection of the public. Between thirty and forty persons, and nearly all of the practicing naturopaths in this State, have taken and passed the examination given by this Board (hereinafter the "Board of Naturopathic Examiners").

2.

JAMES BERRYHILL, N.D. is a member of the Board of Naturopathic Examiners. He has been a practicing naturopath for the past seven (7) years, and operates a business in DeKalb County.

3.

LANCE THOMAS has been a practicing naturopath for years, until on or about April 2, 1982, when he was forced by the County Solicitor to cease practice.

4.

Plaintiffs JOY BAILEY and REBA CANALES are clients of members of the Board of Naturopathic Examiners, and seek to obtain information concerning the philosophy of naturopathy and to receive naturopathic treatment.

5.

Defendant MICHAEL BOWERS is sued in his official capacity as Attorney General of the State of Georgia, and is charged with the State-wide enforcement and administration of the challenged statutes.

6.

Defendant COMPOSITE STATE BOARD OF MEDICAL EXAMINERS, (hereinafter "The Board"), is charged with the control and regulation of the practice of medicine, as defined by Ga. Code Ann. §84-901, and is empowered to carry out investigations in furtherance of said duties.

7.

Solicitor, HERBERT RIVERS can initiate and maintain prosecution under the challenged statutes in Cobb County, and has threatened to do so.

GROUNDS FOR JURISDICTION

1. Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit rendered on June 3, 1983, #82-8520 affirming per curiam a decision from the United States District Court for the Northern District of Georgia dismissing plaintiffs' complaint for lack of a substantial federal question.

2. Jurisdiction of the United States Supreme Court is authorized by 28 USC §1254 (1).

3. UNITED STATES CONSTITUTION
   a. First Amendment:
      Congress shall make no law . . . abridging the freedom of speech . . .
   b. Ninth Amendment:
      The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.
   c. Fourteenth Amendment:
      . . . No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

d.

(1) Georgia Code, Chapt. 34, Article I, 43-34-1, see appendix.

(2) Georgia Code, Chapt. 34, Article II, 43-34-26, see appendix.

(3) Georgia Code, Chapt. 34, Article II, 43-34-46, see appendix.

STATEMENT OF THE CASE

What Is Naturopathy?

Webster's Dictionary defines naturopathy as a system of treating diseases largely employing natural agencies such as air, sunshine, and so forth, and rejecting the use of drugs and medicines. *Taber's Cyclopedic Medical Dictionary* defines naturopathy as "a therapeutic system embracing a complete physician-thropy employing nature's agencies, forces, processes, and products, except major surgery."

Employing primarily natural and herbal therapies, naturopathy has been in existence for thousands of years. Rather than focusing upon specific diseases and their related cures as does conventional medicine, naturopathy centers upon the overall health of the individual. The idea is that the body exists in a state of dynamic balance. When the balance is disturbed, disease may take hold. If the balance is restored, however, the body itself can often ward off the malady. Thus, the naturopathist concentrates upon non-toxic means to restore and maintain the overall health of the individual. Naturopathy does not utilize drugs, surgical operations, or x-ray. Rather, it employes the use of the various properties of air, heat, light, water, dietary counseling, nutritional supplementation, and natural herbal remedies.

Naturopathy has long been recognized and protected in Anglo-American culture. In the year 1512 King Henry VIII granted the herbalist charter which guaranteed protection to the practice of naturopathy. (See Congressional Record — House, February 7, 1931).

Naturopathy in Georgia

In 1950, the Georgia State Legislature defined and authorized the practice of naturopathy. In doing so, the Legislature created a board to license naturopaths. It further provided that any one practicing naturopathy in violation of the statute would be guilty of a misdemeanor.

In 1956, however, the Legislature repealed the section of the Code establishing the examining board. The remainder of the Article was left entirely intact. On March 11, 1982, the Attorney General of Georgia issued an official opinion at the request of the Secretary of the State Medical Examining Board. The Attorney General concluded that anyone practicing naturopathy in the State of Georgia without a medical license issued by the Board of Medical Examiners would be guilty of engaging in the practice of medicine without a license, a felony.

On Friday, April 2, 1982 Lance Thomas, a practicing naturopath, was advised by an agent of the solicitor's office of Cobb County, Georgia that if he opened his office he would be arrested. The State Board of Medical Examiners has advised other naturopaths that it intends to actively pursue any complaints lodged against them for practicing medicine without a license as defined in the Attorney General's opinion.

On June 11, 1982 plaintiffs filed a civil complaint in the United States District Court for the Northern District of Georgia, Atlanta Division. Plaintiffs sought declaratory and injunctive relief under the 1st, 4th, 5th, 9th, and 14th Amendments to the United States Constitution. Jurisdiction of the District Court arose under 28 U.S.C. §1331, §1343 (3) and (4), 42 U.S.C. §1983 and §1988, and 28 U.S.C. §2201 and §2202.

On June 11, 1982, Judge Charles A. Moye, Jr., Judge of the Northern District Court of Georgia issued a temporary restraining order enjoining the defendants from enforcing the relevant portions of the Georgia Code. He further ordered a combined hearing on the merits of a preliminary injunction and a permanent injunction.

On August 4, 1982, the District Court ruled that the plaintiffs had not raised a sufficiently substantial federal question to warrant federal judisdiction. Finding that any constitutional claims raised were vague and insubstantial, and noting that no actual prosecutions had been undertaken, the Court dismissed plantiffs complaint.

Plaintiffs appealed the District Court decision to the Eleventh Circuit Court of Appeals of the United States. On June 3, 1983, however, the Circuit Court affirmed per curiam the decision of the District Court. Plaintiffs now come before this Court on petition for writ of certiorari.

ARGUMENT

I. SUMMARY OF ARGUMENT

Plantiffs' claims that the medical practice acts of the Georgia Code as applied by the Attorney General violate the Fourteenth Amendment's due process protections as well as the right of privacy and the right to receive information are substantial. Indeed, the Fifth Circuit has directly held as much. Accordingly, the decision of the Eleventh Circuit sets up a direct contradiction between the circuits and thus warrants review.

Plaintiffs' claims that the Georgia medical practice acts violate the Fourteenth Amendment as void for vagueness are certainly substantial under the precedential opinions of this Court. The decision of the Eleventh Circuit thus contradicts the established law as outlined by this Court and thereby warrants review.

Finally, opinions of this Court make it clear that plaintiffs are not barred from a federal hearing of their claims because an actual prosecution has not yet been undertaken.

II. PLAINTIFFS HAVE RAISED SUBSTANTIAL FEDERAL QUESTIONS.

When a plaintiff states a valid claim genuinely arising under the Constitution of the United States, that claim must be heard unless

plaintiff's allegations are patently without merit. *Hagans v. Lavine*, 415 U.S. 528 (1974).

A plaintiff's federal question is unsubstantial if it is either obviously frivolous or clearly foreclosed by previous decisions of the Supreme Court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933).

In the instant case, plaintiffs claims are genuine and supported by established precedent of this Court.

III. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION WHICH IS DIAMETRICALLY OPPOSED TO DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS ON FACTS WHICH ARE VIRTUALLY IDENTICAL.

A. Plaintiffs Have Raised Sufficiently Substantial Federal Questions With Respect To The Substantive Due Process Protections Of The Fourteenth Amendment, The Public's First Amendment Right To Receive Information And The Ninth Amendment Right To Privacy To Warrant Review On The Merits By The Federal District Court.

In the instant case, plaintiffs, doctors of naturopathy in the State of Georgia, contend that the state's blanket prohibition of the practice of naturopathy excepting only those persons licensed by the Board of Medical Examiners (or similar boards of other medical fields) violates the due process clause of the Fourteenth Amendment. Plaintiff naturopaths have been practicing their healing art in Georgia for a number of years. They have been doing so under a 1950 Act of the Georgia State Legislature recognizing the practices of naturopathy and establishing a board for the licensing of practitioners thereof. In 1956 the Legislature repealed the section of the Act creating the board but left the remainder of the statutory authorization intact. Since 1956, the practice of naturopathy has continued and flourished in the state. Plaintiffs have thus acquired a property right in their profession

entitled to due process protections. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Even when legislating to protect the public health, a state's regulation of the practice of a profession must bear a rational relationship to a legitimate state interest. *Dent v. State of West Virginia*, 129 U.S. 114 (1888). Plaintiffs naturopaths contend that requiring them to attend standard medical or chiropractic schools and take related examinations both of which relate to areas of knowledge foreign to the naturopathic profession, all before they may suggest the use of various herbs and dietary changes to their patients, bears no rational relation to the state interest in protecting the public health.

Plaintiffs Joy Bailey and Reba Canales contend that the Georgia Medical Statutes as applied violate their 1st Amendment rights to receive information and their 9th Amendment right of privacy. The 1st Amendment protects the public's right to receive information. *Virginia Board v. Virginia Consumer Counsel*, 425 U.S. 748 (1976). The Ninth Amendment guarantees a person's individual right of privacy. *Roe v. Wade*, 410 U.S. 113 (1973). Justice Douglas, in *Doe v. Bolton*, 410 U.S. 179 (1973) (concurring opinion), stated that the "right of privacy" included "the freedom to care for one's health and person." *id. at 213*. And, Chief Justice Burger, while a Circuit Judge for the District of Columbia, included the choice of "refusing medical treatment even at great risk" among those included in the right of privacy. *Application of President and Directors of Georgetown College, Inc.*, 331 F. 2d 1010, 1017 (D.C. Cir. 1964).

The above plaintiffs argue that requiring naturopaths to be licensed by the Board of Medical Examiners will effectively foreclose the practice of naturopathy in the State of Georgia. The free-flow of ideas and their right to receive information regarding naturopathy will accordingly be suppressed in violation of the First Amendment. And, their rights to receive the medical treatment of their choice protected by their constitutional right to privacy, will thus be trampled upon by the State.

In response to these arguments the district Court cites *Idaho*

Association of Naturopathic Physicians, Inc., et al. v. United States Food and Drug Administration, et. al., 582 F. 2d 849 (4th Cir. 1978), *Cert. den.* 440 U.S. 976 (1978). In that case, the Fourth Circuit, after reviewing decisions rejecting similar claims of other naturopathic associations and persons desiring naturopathic treatment, held that plaintiffs naturopathic associations and persons desiring such treatment had not raised sufficiently substantial federal questions to warrant federal court jurisdiction over their claim. So citing, the District Court in the instant case dismissed plaintiffs claims and the Eleventh Circuit Court of Appeals affirmed per curiam.

However, the Fifth Circuit Court of Appeals in reviewing almost identical arguments brought by chiropractors against a similar statute in Louisiana, ruled: "The state cannot deny to any individual his right to exercise a reasonable choice in the method of treatment of his ills, nor the correlative right of practitioners to engage in the practice of a useful profession." *England v. Louisiana State Board of Medical Examiners, et al.*, 259 F. 2d 626 (5th Cir. 1958). T' : Fifth Circuit went on to say, "It is not denied that the State may regulate within reasonable grounds the practice of chiropractic for the protection of public health; but it is claimed that the requirements of a diploma from a college approved by the American Medical Association and a knowledge of surgery and materia medica bear no reasonable relation to the practice of chiropractic. Without hearing the evidence, we cannot say that those claims are untrue, or that a reasonable man might not intelligently choose a chiropractor for the treatment of some particular ailment." *id. at 627.* Obviously, the legal principles involved are identical whether the profession at issue is chiropractic or naturopathy.

In *England* a petition for rehearing was denied with extensive written opinion which concluded "The State cannot outlaw an allegedly useful and lawful profession without a 'reasonable' or 'rational' basis for so doing. . . . The defendants motion to dismiss must take the plaintiffs allegations as true. Thus taken, they make out a prima facie case under existing law." *England v.*

Louisiana State Board of Medical Examiners, 263 F. 2d 661, 674 (5th Cir. 1959), *Cert. Den.*, 359 U.S. 1012.

In a similar case the United States Court of Appeals for the Fifth Circuit considered whether *naturopathic* physicians could enjoin the Texas State Board of Medical Examiners from enforcing the Texas Medical Practice Act on grounds that it violated the Federal Constitution. The case had been dismissed by the District Court for failure to state a substantial federal question. Relying upon the *England* decision, the Fifth Circuit said, "We believe that a substantial federal question has been raised in this case warranting a trial before a 3-Judge Court. The judgement is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion." *Stuart v. Wilson*, 293 F. 2d 915, 917 (5th Cir. 1961).

In 1980, the United States District Court, S.D. Texas, relying in part upon *England* considered whether the practice of acupuncture could be limited to those persons licensed by the Texas State Board of Medical Examiners. *Andrews, et al. v. Ballard, et al.*, 498 F. Supp. 1038 (S.D. Tex. 1980). Relying in part upon *England* the Court in an extensive opinion held that the Ninth Amendment right to privacy foreclosed the state from limiting the administration of acupuncture treatment to physicians licensed to practice medicine in Texas. Said the court, "The plaintiffs have a constitutional right, encompassed by the right of privacy, to decide to obtain acupuncture treatment. The challenged articles and rules effectively deprive them of that right and are not necessary to serve the state's interest in protecting the patient's health." *id. at 1057.*

Accordingly, decisions in the Fourth and Eleventh Circuit Court of Appeals are clearly in conflict with decisions in the Fifth Circuit Court of Appeals on the same matter. Such conflict leads to confusion and irregularity in federal law. It is therefore appropriate for this Court to grant the instant petition for certiorari in order to resolve the confusion.

IV. THE ELEVENTH CIRCUIT DID NOT FOLLOW CONSTITUTIONAL PRECEDENT WHEN IT AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PLAINTIFF'S COMPLAINT.

A. Plaintiffs Attack Upon Georgia Statutes As Void For Vagueness Is Substantial.

Georgia statutes have recognized the legitimate practice of naturopathy since 1950. In 1956, the Georgia legislative passed "The Principles of Naturopathy Act" which, repealed the provision of a prior act establishing the Georgia Board of Naturopathic Examiners, but left the remainder of the previous act totally intact.

The provisions defining naturopathy and providing for misdemeanor punishment of those practicing naturopathy in violation of the article are now contained in Article 1 of Chapter 34 of the Official Code of Georgia Annotated (GA. STAT. 43-34-1). Chapter 34 is entitled, Physicians, Osteopaths, Orthotistis, Etc. and Article 1 is entitled Practice of Naturopathy.

Section 43-34-26 of Article 2 defines the practice of medicine without a license and Section 43-34-46 provides a felony punishment for those doing so. Georgia courts have interpreted 43-34-26 as including all fields of the healing arts unless specifically excluded or **authorized by another provision of the statutes.** *Georgia Association of Osteopathic Physicians and Surgeons v. Allen,* 31 F. Supp. 206 (M.D. GA. 1940) and 1982 Op Att'y Gen. p.4. Numerous fields such as podiotry, physical therapy, etc., like naturopathy, are not specifically excepted by 43-34-26 but are authorized in other statutory provisions. All such fields have been consistently interpreted as not covered by 43-34-26.

To pass constitutional muster, a criminal statute must be sufficiently clear in its meaning to appraise or warn potential violators of the dangers before them. Thus, where "men of common intelligence must necessarily guess at its meaning and differ as to its application. . ." *Keyshian v. Board of Regents,* 385 U.S. 589, 604 (1967) a statute is void for vagueness. Indeed, due process requires at minimum that an accused be on notice that his acts are proscribed by the State. Statutory language must therefore be suf-

ficiently precise to delineate the conduct which the State seeks to prohibit and the corresponding sanctions which it threatens to impose. *Papachristus v. City of Jacksonville*, 405 U.S. 156 (1972). As stated by the Court in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) "no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *id. at 453.*

Moreover, reasonably precise statutory guidelines are necesary to prevent arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). That ours is a government of laws and not men is absolutely fundamental to our constitutional system. Laws must not therefore employ terms or meanings so broad as to allow men in positions of power to pick and choose the times, places and persons to which and to whom such laws are to be applied.

The Georgia statutory scheme as it is being currently applied to naturopathy is clearly unconstitutionally vague. Nothing in 43-34-1 of the Georgia Code alerts a naturopathist tothe fact that by practicing his profession, he may be subjecting himself to criminal jeopardy.

Of course, the statute itself provides that its violation may be punished as a misdemeanor. From that, however, a naturopath would or could logically infer that only practicing naturopathy beyond the limitations delineated by the statute would be punishable. Thus, one employing the use of drugs, surgery, x-rays, or radium therapy in the practice of naturopathy would be in violation of the statute whereas a naturopathist limiting his practice to the traditional techniques described in the statute would not be in violation. Nothing in the naturopathy article or the subsequent article related to physicians negates such a logical interpretation. Indeed, the statutes relating to medical practice generally provide that their violation constitutes a felony whereas the violation of the naturopathy statute is a misdemeanor. Under such circumstances, a law abiding naturopathist would simply be under no notice whatsoever that his activities were prohibited by the State of Georgia.

The Attorney General opines, however, that by repealing the

statutory section creating the Board of Naturopathic Examiners, the Georgia Legislature clearly repealed the entire statute. Of course, the statute does not foreclose such an interpretation. However, the Attorney General's office itself must be somewhat confused in its interpretation of the statute. Naturopaths have been plying their trade in Georgia openly and publicly since 1956. The Attorney General's office was undoubtedly aware of them since during that time it issued at least four opinions daling specifically with the practice of naturopathy. At no time did the Attorney General indicate that such persons were practicing medicine without a license. If the Attorney General's office is unable to clearly understand the statutes meaning, common men, nonlawyer, surely cannot be expected to do so.

It may be argued that even if naturopathist were previously unaware that they were practicing medicine without a license, they are clearly now on notice as to their position by dint of the Attorney General's opinion. And, the prosecutors' offices have warned naturopaths before undertaking arrest. But, the Constitution does not allow citizens to be placed at the mercy of such "benevolent prosecutors". Statutory not prosecutorial forewarning is the standard.

The Georgia Medical Practice Statutes are unconstitutionally vague as applied by the Attorney General to the practice of naturopathy. 43-34-1 (a) defines and apparently authorizes the practice of naturopathy. 43-34-2 (b) provides that anyone practicing naturopathy **in violation** of this article shall be guilty of a misdemeanor. (emphasis added) While it is not entirely clear how one violates the Article, it is undeniably apparent that the statute **does not** indicate that any person who merely practices naturopathy shall be guilty of a misdemeanor. And, certainly it does not provide that anyone who practices naturopathy shall be guilty of a **felony.** In short, the Georgia statutes simply do not give fair warning to a naturopath that he must obtain license from the Board of Medical Examiners before practicing his profession. And, the Attorney General is not a medium for discerning the real intent of the legislature. The statutes must speak for themselves if they are to comply with the Fourteenth Amendment to the United

States Constitution.

Under the circumstances, surely plaintiffs have raised a sufficiently substantial federal question on the vagueness issue to warrant federal jurisdiction of their claim.

V. THAT PLAINTIFFS HAVE NOT YET BEEN ACTUALLY PROSECUTED DOES NOT FORECLOSE THE JURISDICTION OF THE FEDERAL DISTRICT COURT.

The "genuine threat of the enforcement of a disputed statute" is sufficient to give plaintiff standing to bring his case into the federal district court. *Steffel v. Thompson,* (Stevens concurring) 415 U.S. 452, 476 (1974).

Petitioners are currently under immediate threat of prosecution and thus clearly meet the *Steffel* standard.

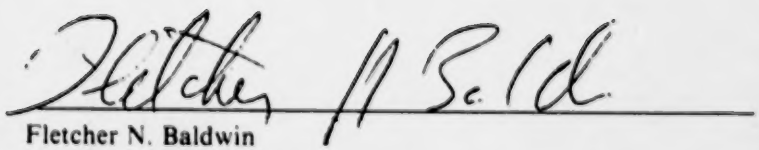
VI. THE TIME IS RIGHT FOR GRANTING CERTIORARI ON THESE IMPORTANT ISSUES INVOLVING THE PUBLIC HEALTH AND THE RIGHT TO PREFERRED MEDICAL TREATMENT.

The American public is increasingly concerned about its physical health. Foods advertising themselves as organic, natural, or without preservatives fill the grocers' shelves. Natural food stores and health food stores are prospering in every town, village, and shopping center in the land. Books showing the way to physical health and fitness top the best seller lists. Almost any late afternoon, Americans can be seen jogging and exercising to keep their bodies in fit condition. Underlying all such lifestyle changes is the idea that somehow our modern sedentary way of life may be detrimental to our physical health. Americans are perceiving moreover that a unhealthy body is a more likely target for our modern predators in the form of cancer, heart attack, and mental breakdowns.

As a part of and a response to these phenomenona, those branches of the healing arts which deal with diet, nutrition, etc. are becoming increasingly prominent. Clearly, as this trend continues, the supply and demand for naturopathic treatment can

only be expected to expand. In response, the traditional health care industry can be expected to resist these changes. Thus, in a highly regulated profession such as the practice of medicine, increasing conflict will be the inevitable result.

The role of the law under such conditions of social change is to insure that all actors in the drama receive fair play and equal treatment. Lower courts need to be aware of the constitutional boundaries to a state's exercise of its police power in regulating the practice of medicine. Must the state recognize the existence of different schools of thought and practice within the healing arts? Do members of the public have the guaranteed right to make their own decisions regarding the medical care of their own bodies? If so, what are the boundaries of the "preferred care" principle? How narrowly must the state draft its medical practice statute? How much discretion can be delegated to the enforcing authorities? Such questions related to modern health care will repeatedly surface in the district courts in the near future. A decision from this Court outlining basic principles to guide such litigation is necessary.



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8520

GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS AND REGISTRARS, INC. *et al.*,
Plaintiffs-Appellants,

versus

MICHAEL BOWERS, Attorney General of the State of Georgia, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(June 3, 1983)

Before KRAVITCH and JOHNSON, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM: AFFIRMED. See Cir. R. 25.

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS and REGISTRARS, INC., JAMES BERRYHILL, N.D., LANCE THOMAS, DR. JOY BAILEY, REBA CANALES,

Plaintiffs

vs.

MICHAEL BOWERS, Attorney General of the State of Georgia; HERBERT RIVERS, Solicitor for Cobb County; and the COMPOSITE STATE BOARD OF MEDICAL EXAMINERS,

Defandants.

C82-1229A

ORDER OF COURT

This matter is before the Court on plaintiffs' motion for a temporary restraining order and preliminary injunction. Plaintiffs seek to have Ga. Code Ann. § 84-901 *et seq.* and § 9914 declared unconstitutional as applied to the practice of naturopathy. Plaintiffs further seek to enjoin the defendants from enforcing these statutes. On June 11, 1982, the Court entered a temporary restraining order and directed that this matter be set down for a hearing on briefs and affidavits. All parties have filed

said briefs and affidavits.

On or about March 11, 1982, the Attorney General of Georgia issued an official opinion which advised the Joint Secretary of the State Examining Boards that:

> "the practice of naturopathy by persons other than those who were licensed pursuant to Ga. Laws 1950, p. 168, or who are otherwise licensed as practitioners of the healing arts in the State of Georgia, constitutes the 'practice of medicine' within the meaning of the Georgia Medical Practice Act; such persons, who intend to practice naturopathy in Georgia, must obtain a license from either the Composite State Board of Medical Examiners or from another licensing board of the healing arts whose regulatory scope would allow the use of naturopathic methods in the practice of that profession."

See Op. Att'y Gen. 82-11. Exhibit A to Brief of Defendants filed June 21, 1982.

Said opinion concluded that: (1) the definition of the "practice of medicine" contained in Ga. Code § 84-901 has been judicially interpreted to include every branch of the healing arts unless another branch is specifically excepted from the Medical Practice Act or is otherwise expressly authorized by law; (2) the only specific exemption or express authorization concerning the practice of naturopathy, Ga. Laws 1950, p. 168, *et seq.*, was repealed in Ga. Laws 1956, p. 36; (3) the Medical Practice Act must therefore be interpreted to include the branch of the healing arts known as "naturopathy." Op. Att'y Gen. 82-11.

Plaintiffs allege that if the Attorney General's opinion is not enjoined their constitutional rights will be violated. Plaintiffs contend that under Ga. Code Ann. § 84-2901 they have a constitutionally protected property interest in the practice of naturopathy. Plaintiffs submit that Ga. Code Ann. § 84-901, *et seq.*, as applied to naturopaths, violates Article I, § 9 pp. 3 (Bill of Attainder), Article VI, § 2 (Supremacy clause), and the 1st, 4th, 5th, 9th, and 14th Amendments of the Constitution.

Defendants argue, inter alia, that plaintiffs' complaint should

be dismissed for want of a substantial federal question. Defendants contend that plaintiffs' claim is so insubstantial that it does not fall within a federal jurisdictional statute.

A number of courts, in actions similar to the one at bar, have addressed the jurisdictional issue and have determined that no substantial federal question was raised. In *Idaho Association of Naturopathic Physicians, Inc., et al. v. United States Food and Drug Administration, et al.*, 582 F. 2d 849 (4th Cir. 1978), *cert. den.* 440 U.S. 976, 59 L. Ed.2d 795, 99 S.Ct. 1541, the plaintiffs included practitioners and students of naturopathy, patients desiring naturopathic treatment and professional associations promoting naturopathy. In that case, the plaintiffs sought a declaratory judgment defining naturopathy as "a separate and distinct healing art, science and philosophy of medicine," and also claimed that they shuld be permitted to use and prescribe a variety of natural foods and medicine, and that every statute, regulation and administrative practice or policy of the defendants that restricted naturopathy more narrowly than the asserted definition was void and unenforceable as to the plaintiffs. Also, asserted, among other claims, was a right by patients to a reasonable choice of treatment. *Id.*, at p. 850. The Court of Appeals dismissed for lack of a substantial federal question, noting that since 1948, the United States Supreme Court had summarily affirmed or dismissed at least seven cases challenging state regulation of naturopathy, and that the contentions of the plaintiffs had been "firmly, repeatedly and authoritatively rejected." *Id.* at pp. 853-854.

The Court agrees that the case at bar has failed to eet the jurisdictional prerequisite of presenting a subs.antial federal question.

Plantiffs' assertions that this case involves a Georgia statute which clearly authorizes the practice of naturopathy is unpersuasive. Such an assertion is based on plaintiffs' own reading of the statute. The Attorney General of the State of Georgia has read the statute to mean otherwise and has issued a formal opinion to that effect. As to which reading, if either, is correct, this Court is not in a position to determine. Such a determination would properly be made in Georgia State Court.

The Court finds that any constitutional claims are so vague they are insubstantial. No prosecutions have been made relating to this matter and the only harm to plaintiff is the potential prosecution for the practice of naturopathy. Since it is probable that any constitutional claims will be raised during the course of any criminal prosecution concerning this matter, the Court expects that the matters herein will likely be ripe for determination at that time.

In summary, the Court finds that plaintiffs' complaint has failed to meet the jurisdictional prerequisite of presenting a substantial federal question. *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980), *cert denied*, 449 U.S. 1015. Accordingly, the Court hereby dismisses plaintiffs' complaint.

SO ORDERED, this _____ day of August, 1982.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS and REGISTRARS, INC., JAMES BERRYHILL, N.D., LANCE THOMAS, DR. JOY BAILEY, REBA CANALES,

Plaintiffs

vs.

MICHAEL BOWERS, Attorney General of the State of Georgia; HERBERT RIVERS, Solicitor for Cobb County; and the COMPOSITE STATE BOARD OF MEDICAL EXAMINERS,

Defendants

CIVIL ACTION
NO. C82-1229A

ORDER

This matter having come before the Court upon the sworn and verified complaint of plaintiffs, a motion for temporary restraining order and preliminary injunction, memorandum and affidavits and pursuant to Fed. R. Civ. P. 65, and it appearing that unless defendant Rivers is restrained, the plaintiffs may be irreparably harmed, it shall be and is hereby ORDERED that:

(A) Defendant Rivers, his agents, employees, representatives and all persons acting directly or indirectly with him are temporarily restrained from enforcing the provisions of Ga. Code Ann. §§ 84-901, 906 and 9914 against plaintiff naturopaths;

(B) A hearing in this action on the request for preliminary in-

junction shall be had on briefs and affidavits, which may be filed no later than June 21, 1982;

(C) This order shall remain in effect for a period not to exceed ten (10) days and until the Court has ruled with respect to the motion for temporary injunction (on affidavits and briefs);

(D) The hearing on the preliminary injunction and on the merits for permanent injunction are hereby combined.

SO ORDERED, this_____ day of June, 1982.

_____

UNITED STATES DISTRICT JUDGE

The Department of Law
State of Georgia
Atlanta

LETTERHEAD

March 11, 1982

Honorable Michael R. Fowler
Joint Secretary
State Examining Boards
166 Pryor Street, S.W.
Atlanta, Georgia 30303

RE: The practice of naturopathy by persons other than those who were licensed pursuant to Ga. Laws 1950, p. 168, or who are otherwise licensed as practitioners of the healing arts in the State of Georgia, constitutes the "practice of medicine" within the meaning of the Georgia Medical Practice Act; such persons, who intend to practice naturopathy in Georgia, must obtain a license from either the Composite State Board of Medical Examiners or from another licensing board of the healing arts whose regulatory scope would allow the use of naturopathic methods in the practice of that profession.

Dear Mr. Fowler:

You have requested an Official Opinion on the question of whether persons who engage in the practice of naturopathy and who were not licensed pursuant to Ga. Laws 1950, p. 168, or who are not otherwise licensed as practitioners of the healing arts in the State of Georgia, are "practicing medicine" without a license, in violation of the Georgia Medical Practice Act.

It is the law in Georgia that if any person:

> ". . . shall hold himself out to the public as being engaged in the diagnosis or treatment of disease or injuries of human beings, or shall suggest, recommend or prescribe any form of treatment for the palliation, relief or cure of any physical or mental ailment of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever, or shall maintain an office for the reception, examination or treatment of diseased or injured human beings, . . . and shall not in any of these cases then possess in full force and virtue a valid license to practice medicine under the laws of this State, he shall be deemed to be practicing medicine without complying with the provisions of this Chapter (Ga. Code Ch. 84-9), and in violation thereof."

Ga. Laws 1913, pp. 101, 108; 1918, pp. 173, 196; 1970, pp. 301, 305; 1972, p. 673 (Ga. Code § 84-906) (parenthetical supplied).

The above-cited definition has been construed by the courts to include every branch of the healing arts, and to require any person "practicing medicine" obtain a license from the Medical Board. *See Georgia Association of Osteopathic Physicians and Surgeons v. Allen,* 31 F. Supp. 206, 211 (M.D. Ga. 1940). *Mabry v. State Board of Medical Examiners in Optometry,* 190 Ga. 751, 758 (1940). The legislature further intended that the definition of "practicing medicine" should from time to time be limited by excluding from it any branch which had been or might later be expressly defined and authorized by law so that any person not specifically authorized by law to practice some other branch of the healing arts would be regarded as practicing medicine, in violation of the Medical Practice Act, if he in any way practiced healing without an appropriate license. *Georgia Association of Osteopathic Physicians and Surgeons v. Allen, supra,* 31 F. Supp. at 211. An exception from the operation of the Medical Practice Act would be effected by either inserting it in the Medical Practice Act itself, or by passage of a superseding conflicting statue. *Id.* at 211.

While the Medical Practice Act has never contained a specific exception allowing the practice of naturopathy, in 1950, the Georgia Board of Naturopathic Examiners was established by legislation, and naturopathic practitioners were required to obtain a license from said Board in order to practice naturopathy. Ga. Laws 1950, p. 168 (former Ga. Code Ann. Ch. 84-29). "Naturopathy" was defined in said Act as:

> ". . . that philosophy and system of the healing art embracing prevention, diagnosis, and treatment of human ills and functions by the use of several properties of air, light, heat, cold, water, manipulation, with all use of such substances, nutritional as are naturally found in and required by the body, excluding drugs, surgery, X-ray, and radium therapy, and the use of X-ray equipment."

Ga. Laws 1950, pp. 168, 172-172.

In Acts 1956, p. 36, however, the Act creating the Georgia Board of Naturopathic Examiners was repealed. The 1956 Act leaves the definitionof naturopathy intact, provides a penalty for any person practicing naturopathy in Georgia "in violation of the provisions of this Act," and also provides that [t]he provisions of this Act shall not apply to any person who is licensed to practice the healing arts under any other law of this State if the law under which such person is licensed, authorizes the practice of naturopathy." Ga. Laws 1956, pp. 36, 37 (Ga. Code Ann. §§ 84-2901; 84-2902; 84-9949). The Act of 1956 also effectively eliminates any mechanism whereby the competency or qualifications of persons desiring to practice naturopathy can be established and regulated, and removes any licensing function from the Joint Secretary of the State Examining Boards, other than the preservation of records. *See* Ops. Att'y Gen. 1960-1961, p. 415; 1954-1956, p. 546.

Since the definition of the "practice of medicine" contained in the Medical Practice Act is broad enough to include every branch of the healing arts, unless another branch is specifically

excepted from the Act or is otherwise expressly authorized by law, and since the only specific exception or express authorization concerning the practice of naturopathy, in Ga. Laws 1950, p. 168, was repealed in 1956, the Medical Practice Act must be interpreted to include the branch of the healing arts known as "naturopathy."

Therefore, it is my Official Opinion that the practice of naturopathy by persons other than those who were licensed pursuant to Ga. Laws 1950, p. 168, or who are otherwise licensed as practitioners of the healing arts in the State of Georgia, constitutes the "practice of medicine" within the meaning of the Georgia Medical Practice Act; such persons, who intend to practice naturopathy in Georgia, must either obtain a license from the Composite State Board of Medical Examiners or a license from another licensing board of the healing arts whose regulatory scope would allow the use of naturopathic methods in the practice of that profession.

I trust that this has been responsive to your inquiry.

Sincerely,

MICHAEL J. BOWERS
Attorney General

Prepared by:

RAY O. LERER
Assistant Attorney General

ARTICLE I

GENERAL PROVISIONS

43-34-1. Practice of naturopathy.

(a) As used in this Code section, the term "naturopathy" means a philosophy and system of the healing art embracing prevention, diagnosis, and treatment of human ills by the use of air, light, heat, cold, water, and manipulation, together with the use of such nutritional substances as are naturally found in and are required by the body; such treatment avoids the use of drugs, surgery, X-rays, and radium therapy.

(b) Any person who practices naturopathy in this state in violation of this article shall be guilty of a misdemeanor.

(c) This Code section shall not apply to any person who is licensed to practice the healing arts under any other law of this state if the law under which such person is licensed authorizes the practice of naturopathy. Ga. L. 1950, p. 168 §§ 10, 14, 15; Ga. L. 1956, p. 36 §§ 2, 3, 4.)

JUDICIAL DECISIONS

Definition of drugs. — A drug is defined as the general name of substances used in medicines; and any substance, vegetable, animal, or mineral, used in composition or preparation of medicines; or any substance used as a medicine. Shawver v. State, 103 Ga. App. 1, 118, S.E.2d 202 (1961)

43-34-2. Termination

For the purposes of Chapter 2 of this title, "The Act Providing for the Review, Continuation, Reestablishment, or Termination of Regulatory Agencies," the Composite State Board of Medical Examiners shall be terminated on July 1, 1982, and this chapter and any other laws relating to such board shall be repealed in their entirety effective on the date specified in Code Section 43-2-8.

43-24-26. Engaging in practice of medicine without a license.

(a) If any person shall hold himself out to the public as being engaged in the diagnosis or treatment of disease or injuries of human beings, or shall suggest, recommend, or prescribe any form of treatment for the palliation, relief, or cure of any physical or mental ailment of any person, with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever, or shall maintain an office for the reception, examination, or treatment of diseased or injured human beings, or shall attach the title "M.D.," "Oph., " "D.," "Dop.," "Surgeon," "Doctor," "D.O.," "Doctor of Osteopathy," either alone or in connection with other words, or any other word or abbreviation to his name indicative that he is engaged in the treatment of diseased, defective, or injured human beings, and shall not in any of these cases then possess a valid license to practice medicine under the laws of this state, he shall be deemed to be practicing medicine without complying with this chapter and shall be deemed in violation of this chapter.

(b) Nothing in this chapter shall be construed to prohibit:

(1) Gratuitous services in cases of emergency;

(2) The practice of the religious tenets or general beliefs of any church whatsoever;

(3) The requiring of a fee for examination by opticians, at their established places of business, who do not prescribe or use drugs or medicines or attach to their names titles indicative that any such persons are engaged in the practice of medicine, as defined in this chapter;

(4) The performance of their duties for the federal government by federal physicians, both military and civilian;

(5) The practice of medicine, by an individual appointed as an intern or accepted for specialty or residency training in programs approved by the board, for a period of two years or for such additional period as the board, by appli-

years or for such additional period as the board, by application may determine;

(6) The consultation on special cases in this state of regularly licensed physicians from other states or territories;

(7) The licensed practice of dentistry, optometry, or chiropractic;

(8) The licensed practice of midwifery or nursing;

(9) The utilization of a physician's assistant to perform tasks approved by the board, and the performance of such tasks by the physician's assistant; the delegation by a physician to a qualified person other than a physician's assistant of any acts, duties, or functions which are otherwise permitted by law or established by custom; and the performance of such acts, duties, or functions by such a person other than a physician's assistant; or

(10) The performance of:

(A) Any medical task by a student enrolled in a medical college, osteopathic college, or physician's assistant training program approved by the board; or

(B) Any dental task by a student enrolled in a dental college approved by the Georgia Board of Dentistry where either type task is performed under the supervision of an authorized instructor lawfully licensed in this state to perform such tasks.

(c) Nothing in this chapter shall be construed as preventing any person holding a valid license as a Doctor of Osteopathy on March 16, 1970, from engaging in the practice of osteopathy as the same was practiced by such person at such time, subject to biennial renewal of his license. Such limited renewal licenses shall not authorize the practice of obstetrics or surgery other than the minor suturing of cuts.

(Ga. L. 1913, p. 101, § 6; Ga. L. 1918, p. 173 § 4; Code 1933, § 84-906; Ga. L. 1970, p. 301, § 4; Ga. L. 1972, p. 673 § 1.)

43-34-46. Penalty.

(a) Any person who practices medicine without complying with this article or who otherwise violates any provision of this article shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $1,000.00 or by imprisonment from two to five years, or both.

(b) Any person presenting or attempting to file as his own the diploma or certificate or credentials of another, or who shall give false or forged evidence of any kind to the board or any member thereof in connection with an application for a license to practice medicine, or who shall practice medicine under a false or assumed name, or who shall falsely impersonate any other practitioner of a like or different name shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $1,000.00 or by imprisonment from two to five years, or both. (Ga. L. 1913, p. 101, § 15; Code 1933, § 84-9914; Ga. L. 1976, p. 687, § 2.)